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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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January 21, 2016

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security

The Honorable Alejandro N. Mayorkas
Deputy Secretary
U.S. Department of Homeland Security

The Honorable Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Dear Secretary Johnson, Deputy Secretary Mayorkas, and Director Rodriguez:

I write today to obtain additional information about the Department of Homeland Security's (DHS) efforts to block the dedicated men and women of U.S. Citizenship and Immigration Services (USCIS) from conducting effective, life-saving investigations of foreign nationals who are seeking entry into, or have entered, the United States. Prompt attention to this matter is essential, particularly because it is now clear that DHS's restrictions on investigator access to publicly accessible social media may be responsible for the loss of American lives on American soil.

Recent news accounts have indicated that Tashfeen Malik – who, along with her husband, Syed Rizwan Farook, murdered 14 Americans in San Bernardino, California, on December 2, 2015 – had made comments on social media in support of radical Islam and anti-Western jihad prior to the attack.¹ These same news accounts have provided conflicting information about whether social media content could be viewed by federal investigators who were responsible for conducting the background investigations of such foreign nationals.² But for the swift

¹ See Richard A. Serrano, *Tashfeen Malik messaged Facebook friends about her support for jihad*, L.A. TIMES (Dec. 14, 2015) (noting how Malik “sent at least two private messages on Facebook to a small group of Pakistani friends on 2012 and 2014, pledging her support for Islamic jihad and saying she hoped to join the fight one day”); Matt Apuzzo, Michael S. Schmidt and Julia Preston, *U.S. Visa Process Missed San Bernardino Wife’s Zealotry on Social Media*, N.Y. TIMES (Dec. 12, 2015) (noting how Malik cleared three separate background checks by “American immigration officials,” but that “[n]one uncovered what Ms. Malik had made little effort to hide – that she talked openly on social media about her views on violent jihad, ... said she supported it ... [a]nd she said she wanted to be part of it”).

² See, e.g., Justin Peligri, *Kerry: Social Media Places “Whole New Burden” on Visa Process*, NBCNEWS.COM (Dec. 13, 2015) (quoting Kerry as saying that social media content represents a “loophole” in the U.S. visa vetting

intervention of heroic local law enforcement officials, Malik and Farook might have staged an even larger and more devastating attack, with greater loss of life.³

The Committee now has internal DHS documents that clearly show this Administration's DHS and USCIS leadership actively terminated the previously existing ability of USCIS personnel to use publicly accessible social media content for investigative purposes. Based on all that we know about the communications and recruiting methods of the Islamic State of Iraq and Syria (ISIS), this refusal to permit the use of publicly accessible information is nothing short of colossal negligence on the part of your agencies.

The documents in our possession show, among other things, that DHS used its Privacy Office in 2011 to shut down the ability of USCIS's Fraud Detection and National Security Directorate (FDNS) to view publicly accessible social media content. In a letter and accompanying attachment dated March 16, 2011, former DHS Chief Privacy Officer Mary Ellen Callahan informed Deputy Secretary Mayorkas – who was then the director of USCIS – that the Privacy Office would be leading an investigation into a news report about an FDNS memorandum discussing the directorate's use of social media to help conduct its immigration fraud and national security investigations.

In the letter to then-Director Mayorkas, Callahan stated that the revelation of the FDNS memorandum “has raised concerns that the DHS Privacy Office would like to address to ensure the use of social networking sites by FDNS is in compliance with DHS privacy policy and applicable laws and has not exceeded its delegated authority.” The attachment that accompanied the letter listed a series of document and information requests that were to be fulfilled by USCIS and FDNS, with a focus on materials produced by, and the personnel in, the FDNS branch office in Yakima, Washington.

The documents also show that FDNS management subsequently directed FDNS personnel to discontinue the use of publicly accessible social media content in the course of investigations. In an e-mail dated December 6, 2011, Steve Bucher, who is identified in the e-mail as FDNS's Acting Associate Director, sent the following message to all FDNS personnel:

process); Brian Ross, Rhonda Schwartz, James Gordon Meek and Josh Margolin, *Secret US Policy Blocks Agents From Looking at Social Media of Visa Applicants, Former Official Says*, ABCNEWS.COM (Dec. 14, 2015) (stating that, “[f]earing a civil liberties backlash and ‘bad public relations’ for the Obama Administration, Homeland Security Secretary Jeh Johnson refused in early 2014 to end the secret U.S. policy that prohibited immigration officials from reviewing the social media messages of all foreign citizens applying for U.S. visas”); *but see* Dylan Byers, *New York Times revises ‘garbled’ report on San Bernardino shooters*, CNN MONEY (Dec. 17, 2015) (citing comments by Federal Bureau of Investigation Director James Comey that questioned the availability of Malik's social media comments online and the accuracy of media reporting on the subject); Pamela Engel, *Here's the ISIS message the female San Bernardino shooter posted on Facebook during the attack*, BUSINESS INSIDER/YAHOO! NEWS (Dec. 17, 2014) (noting how Malik's pre-visa social media postings may have been available to a few people and not viewable by the public).

³ See Andrea Noble, *Feds find 15 pipe bombs at San Bernardino suspect-linked locations*, WASH. TIMES (Dec. 3, 2015) (noting how a total of 15 pipe bombs were recovered from two separate locations linked to Malik and Farook, and how three undetonated explosive devices were recovered from the Inland Regional Center).

This is a reminder and clarification that all FDNS employees are prohibited from accessing Social Networking Sites from any source for official government purposes. USCIS is working on a policy and procedures that may permit future access in the near future. We will notify if and when the current policy changes.

In light of the terrorism in San Bernardino on December 2, it appears that DHS's policy of willful blindness toward the reality and danger of radical Islam in the United States contributed to the death of 14 Americans here at home. Indeed, rather than being an aberration, this policy seems to be all too consistent with other policies of DHS and USCIS, which restrict fraud and terrorism investigators from fulfilling their missions and (arguably) enable fraudulent and dangerous people to enter and remain in the United States.

Much more information is needed about the logic and decision-making behind this exceedingly dangerous policy and the DHS investigation that created it, including whether any replacement policies have been implemented, and how they work. Given the rise and proliferation of social media, and younger generations' increasing reliance on these media, DHS cannot afford to have policies that are blind to information made available on social media and the Internet.

In addition to requesting the specific information listed below, I am asking you, as leadership of the relevant agencies, to treat this letter as a preservation order for **all** internal agency documents and information addressing or investigating the ability of DHS, USCIS, or FDNS personnel to use social media for investigative purposes, and to take extraordinary steps to see that these documents and information are preserved. This preservation request is unfortunately necessary, given this Administration's poor track record for recordkeeping and repeated refusals to follow other laws.

I will also take this moment to remind you, your fellow political appointees within the Department, and any other Department employees, advisors, or contractors that destruction of any of the requested documents or information could subject those responsible for such destruction to criminal prosecution in the future.⁴ One's position as a past or present federal employee does not afford immunity from the federal criminal justice system. It is my hope that a future administration would pursue justified prosecutions with all due energy.

In accordance with the above, I would request that the Department engage in the following preservation efforts, effective immediately:

1. Preserve all **classified and unclassified** records (which include, but are not necessarily limited to, paper-based documents, e-mail-based communications, e-mail-based calendar appointments, electronic documents, electronic communications (including voicemails, SMS (i.e., text) messages, and instant messages), and all other electronic data regardless of format), created since October 1, 2010, that:

⁴ See generally 18 U.S.C. § 1505.

- a. Are records, **regardless of author, source, or content**, that in any way address the use of social media for official, investigative purposes by DHS, USCIS, and/or FDNS employees, contractors, subcontractors, grantees, subgrantees, or consultants;
- b. Are records **regardless of author, source, or content**, that were requested and/or collected by DHS Chief Privacy Officer Mary Ellen Callahan pursuant to her investigation of USCIS and FDNS, as indicated by her March 16, 2011, letter to former USCIS Director Mayorkas; and
- c. In any way quote, discuss, or mention the USCIS memorandum entitled "Social Networking Sites and Their Importance to FDNS".

For the purposes of this request, "preserve" means taking any and all reasonable steps to prevent the partial or full destruction, alteration, overwriting, formatting, deletion, shredding, incineration, wiping, relocation, migration, theft, revision, or mutation of electronic and non-electronic documents, records, and logs, as well as negligent or intentional handling that would make such records incomplete or inaccessible.

2. Exercise any and all reasonable efforts to identify and notify former Department and/or component employees, contractors, subcontractors, grantees, subgrantees, and consultants who may have access to such electronic or non-electronic records that these records are also to be preserved.
3. If it is a practice of the Department, any Department component, any federal employee, any contract employee, any grantee or subgrantee, or any consultant to destroy or otherwise alter such electronic or non-electronic records, either halt such practices immediately, or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.

I am also requesting that the Department make additional arrangements with both the Department's Inspector General and the Archivist of the United States for them to receive copies of all such records. To be clear, these arrangements would be in addition to standard preservation efforts.

Please also provide the following unredacted documents and information for the time period from October 1, 2010, to the present (unless a different time period is specified below):

1. Any memoranda or reports reviewing or summarizing the results or findings of former DHS Chief Privacy Officer Callahan's social media use investigation, as commenced by the March 16, 2011, letter and accompanying attachment.
2. In the attachment that accompanied Callahan's March 16, 2011, letter, Callahan used the term "beneficiaries" in one of her enumerated request items. Who are "beneficiaries"?
3. An answer to the following questions:

- a. Is it DHS's position that current statutory law precludes DHS, USCIS, and/or FDNS personnel from scrutinizing information available on publicly accessible social media in the course of official visa application vetting? **If your answer is yes, please provide a detailed explanation as to why, with appropriate citations, where applicable.**
- b. Is it DHS's position that the United States Constitution precludes DHS, USCIS, and/or FDNS personnel from scrutinizing information available on publicly accessible social media in the course of official visa application vetting? **If your answer is yes, please provide a detailed explanation as to why, with appropriate citations, where applicable.**
- c. Is it DHS's position that information that is accessible online by the general public constitutes private communication that may not be viewed by DHS, USCIS, and/or FDNS personnel? **If your answer is yes, please provide a detailed explanation as to why, with appropriate citations, where applicable.**
- d. Is it DHS's position that USCIS and/or FDNS personnel are precluded from engaging in national security investigations and inquiries because they are on the benefit side of the immigration equation? **If your answer is yes, please indicate if there are any specific statutory provisions prohibiting USCIS and/or FDNS personnel from engaging in national security investigations and inquiries.**
- e. Is it DHS's position that, if an individual applying for a U.S. visa scores zero "hits" on a domestic or international crime or terrorism database, USCIS and/or FDNS personnel have no basis for engaging in national security investigations and inquiries? **If your answer is yes, please indicate if there are any specific statutory provisions prohibiting USCIS and/or FDNS personnel from engaging in national security investigations and inquiries.**
- f. Is there a mechanism or process by which a USCIS or FDNS employee can "flag" a potential national security concern regarding a visa applicant for follow-up review by either USCIS management, DHS management, or the Federal Bureau of Investigation? **If your answer is yes, please provide a detailed explanation of this mechanism or process.**
- g. In the event a USCIS or FDNS employee flags a potential national security concern, and USCIS and/or FDNS management agrees with the concern, does USCIS refer the applicant's file to the FBI for additional investigation? **If your answer is yes, please provide a detailed explanation of this referral process, and include a discussion of timeline. If your answer is no, please explain why there is no such process.**
- h. In past public domain commentary, including congressional hearings, DHS and USCIS officials have indicated that it is difficult to thoroughly vet all individuals seeking U.S. visas for potential national security vulnerabilities because of the sheer

volume of individuals seeking U.S. visas. **Have DHS and/or USCIS considered reducing the volume of visas that are processed annually as an option for ensuring a more careful and thorough vetting of individuals' files? If your answer is no, please explain why this option has not been considered.**

4. In his e-mail message to FDNS employees on December 6, 2011, Steve Bucher stated that "USCIS is working on [social media content viewing] policy and procedures that may permit future access in the near future. We will notify if and when the current policy changes." Please provide the following information:
- a. Has USCIS and/or FDNS had any organized discussions about possible development or implementation of an alternative social media content viewing policy since December 6, 2011? **If your answer is yes, please provide a summary of such working group or organized findings about such policy alternatives.**
 - b. Has USCIS initiated one or more pilot programs geared toward permitting USCIS and/or FDNS personnel access to publicly available social media content? **If your answer is yes, please provide additional details about any such programs.**
 - c. Does USCIS currently have a policy in place that permits USCIS and/or FDNS personnel to access publicly available social media content? **If your answer is yes, please provide additional details about this policy. If your answer is no, please provide a detailed explanation as to why there is not such a policy.**
 - d. If your answer to Question (4)(c) is no, please provide the name and title of the most senior DHS and/or USCIS employee who signed off on rejecting a new social media content viewing policy.

Please provide the requested documents and information, as well as a detailed update regarding your efforts to coordinate with the Inspector General and the Archivist, no later than **5:00 p.m. on Wednesday, February 3, 2016.**

I look forward to your cooperation. Please contact Committee staff at (202) 224-5225 if you have any additional questions about these requirements.

Sincerely,



Ted Cruz
Chairman
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts

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Cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Christopher A. Coons
Ranking Member
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts

The Honorable John Roth
Inspector General
U.S. Department of Homeland Security

Karen Neuman
Chief
Privacy Office
U.S. Department of Homeland Security

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration

Gary M. Stern
General Counsel
National Archives and Records Administration